

If a retailer collects more tax from a customer than is due, the overcollection must be returned to that customer. If the overcollection is not returned to the customer, it must be paid to the Department as an overcollection. (This is a GIL.)

December 23, 1999

Dear Xxxxx:

This letter is in response to your letter of November 4, 1999. Please accept my apologies for the delay in responding to your inquiry. The Department issues two types of ruling letters, general information letters and private letter rulings. The nature of your letter and the information you provided require that I respond to your inquiry with a general information letter. General information letters do not constitute statements of agency policy that apply, interpret or prescribe the tax laws and are not binding on the Department. The Department administrative rules governing letter rulings and other information issued by the Department are found at 2 Ill. Adm. Code 1200, may be accessed through our Web site, or are available upon request from this office. In your letter you stated:

Having reviewed the Department Web page, including a description of the Problems Resolution Division, I have determined the nature of the issue which I am seeking to have addressed on behalf of a client has sufficient legal implications to suggest that you are the proper person to address in the first instance. I am writing to seek your help and guidance with respect to resolution of an unusual and somewhat complex matter on behalf of our client, a matter that does not lend itself to submission through the Department's Voluntary Disclosure Program. For obvious reasons, I prefer at this point in time to keep my client's identity and the nature of its business confidential.

A (relatively) brief summary of the circumstances surrounding this matter follows:

In 1993, our client purchased a business which provides goods and services in various parts of the country, including the State of Illinois. From the outset, due to internal confusion concerning the appropriate applicable taxes, there has appeared on bills to our client's customers an item labeled "sales tax," which has been collected over the past years. Two problems arise from this set of circumstances:

- 1) The amounts billed (and collected) were greater than the amounts which should have been charged as sales tax (only a portion of the goods and services are subject to the sales tax); and
- 2) Our client has not registered to collect sales tax in the State of Illinois.

With respect to the sales tax issue, we wish to enter into discussions with the Department to achieve the following:

- 1) Prompt registration to collect and remit appropriate sales and use taxes;
- 2) Remittance of past due taxes, with applicable interest, without penalty.
- 3) Waiver by the Department of any claims for moneys improperly collected from customers. This issue, obviously, is the most sensitive one, but any requirement that our client remit (or return) such funds would be devastating to its financial viability.

In addition to the sales tax issue discussed above, our client has also inadvertently failed to collect certain excise taxes which it was not aware were applicable to its business. It has recently commenced the proper collection of these taxes and wishes to "clean the slate" for past years, without penalty.

During the past years, since the purchase of the business, our client has experienced significant growth and turmoil and I assure you that the circumstances described above are the result of inadvertence and oversight rather than any intent to engage in improper activity. Our client is quite reputable and seeks to move forward in the State of Illinois as a "good corporate citizen," without bearing extreme hardship for its past errors. While I realize that such a statement may well be taken with the proverbial grain of salt, in this case it can be demonstrated by the fact that a "sister" company - a company with essentially the same private ownership as the client about whom I am writing (but with different financial and tax personnel) - commenced business in Illinois in 1996, has volume significantly higher than the current client and has been and is, we believe, in full compliance with all Illinois tax statutes.

I hope that you accept this letter in the spirit in which it is intended and look forward to hearing from you soon. Thank you in advance for your anticipated assistance and cooperation.

From your letter, it appears that your client is subject to the Retailers' Occupation Tax ("the ROT"). (35 ILCS 120/1 *et seq.*) The ROT is a tax imposed on persons engaged in the business of selling at retail tangible personal property. (35 ILCS 120/2) In your letter, you indicate that since some time in 1993 your client has been charging and collecting certain amounts from customers that have been characterized on the customers' bills as "sales tax." You indicate that these amounts are in excess of the amounts the you have determined should have been charged as "sales tax" and that such amounts have not been remitted to the Illinois Department of Revenue.

Section 2a of the Retailers' Occupation Tax provides that it is unlawful for any person to engage in business of selling tangible personal property at retail without a certificate of registration from the Department. (35 ILCS 120/2a) Section 13 of the ROT sets forth the criminal penalties that may be imposed for such a violation. (35 ILCS 120/13) In addition to criminal penalties that may be imposed, the Uniform Penalty and Interest Act details the civil penalties that may be imposed for failure to file returns and pay tax in a timely manner. (See

35 ILCS 735/1 *et seq.*) The UPIA also sets forth the manner in which interest is imposed on tax and penalty due. (See 35 ILCS 735/3-2)

In your letter you indicate that you have determined that your client has charged and collected a greater amount of sales tax than you have determined is actually due. You request that your client be allowed to retain this overcollection. The ROT proscribes retention of such amounts. (See 35 ILCS 120/2-40) If your client fails to remit such overcollected amounts to the Illinois Department, or refund such amounts to its customers, your client is subject to criminal penalties imposed under Section 13 of the ROT.

Depending on the particular facts of your client's circumstances, your client may be eligible for participation in the Department's voluntary disclosure program. (35 ILCS 735/3-9(b)) The Department's rules on the voluntary disclosure program are found at 86 Ill. Adm. Code 210.126. The rules are available on the Department's Web Site at <http://www.revenue.state.il.us/legalinformation/regs/part210/210-126.pdf>.

I hope this information is helpful. Please feel free to contact me at your convenience if I may be of further assistance. My direct telephone number is listed above.

Very truly yours,

Keith Staats
General Counsel

KS:ks